(2)

No. 09-1488

IN THE
SUPREME COURT OF THE UNITED STATES

SALLY CORNEJO, individually and on behalf of her minor son Kevin Salas,

Petitioner,

v.

FREDDA MONN, JODI KAPLAN, and DAWN SCHWARTZ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
Attorney for Respondents
100 Church Street
New York, New York 10007
(212) 788-1020 or 1072

LEONARD J. KOERNER,*
KRISTIN M. HELMERS,
JANET LYN ZALEON,
of Counsel.

*Counsel of Record

QUESTION PRESENTED

Did the Circuit Court of Appeals correctly affirm the District Court's holding that the municipal attorneys who initiated and pursued the underlying child-abuse proceedings were entitled to absolute immunity from liability under 42 U.S.C. § 1983, because their function was analogous to that of a prosecutor in a criminal proceeding?

TABLE OF CONTENTS

Page

STATEMENT OF FACTS 1

REASONS FOR DENYING THE WRIT 7

I. Cornejo's Fact-Based Claim Does Not Warrant This Court's Review. 7

II. The Courts Below Correctly Applied Absolute Immunity. 10

III. Cornejo Has Not Shown a Conflict in the Case Law or Identified an Important Federal Question to Support Her Petition for Certiorari. 16

CONCLUSION 20

TABLE OF AUTHORITIES

Cases **Page**

Barrett v. U.S.,
798 F.2d 565 (2d Cir. 1986) 5

Buckley v. Fitzsimmons,
509 U.S. 259 (1993) 14-15

Burns v. Reed,
500 U.S. 478 (1991) 15

Briscoe v. LaHue,
460 U.S. 325 (1983) 6

Butz v. Economou,
438 U.S. 478 (1978) 6-7, 11, 12, 17

Cullinan v. Abramson,
128 F.3d 301 (6th Cir. 1997),
cert. denied, 523 U.S. 1094 (1998), ... 18

Gray v. Poole,
243 F.3d 572 (D.C. Cir. 2001) 16-17

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 11

Imbler v. Pachtman,
424 U.S. 409 (1976) 6, 11-12, 14

Kalina v. Fletcher,
522 U.S. 118 (1997) 14

Page

Lassiter v. Dep't of Social Servs.,
452 U.S. 18 (1981) 13

PJ v. Wagner,
603 F.3d 1182 (10th Cir. 2010) 16

Walden v. Wishengrad,
745 F.2d 149 (2d Cir. 1984) 5, 7, 12-13

Wyatt v. Cole,
504 U.S. 158 (1992) 18

Statutes and Rules

42 U.S.C. § 1983 ..... *passim*

Sup. Ct. R. 10 7

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit is reported sub nom. Cornejo v. Bell at 592 F.3d 121 (2d Cir. 2010), and is reproduced in the Appendix to the Petition for Writ of Certiorari at pages Pet. App. 1 through Pet. App. 18.

The memorandum and order of the United States District Court for the Eastern District of New York, sub nom. Cornejo v. Bell, No. CV-04-0341, is dated May 19, 2008 and is unpublished. It is available at 2008 U.S. Dist. LEXIS 89597 and is reproduced in the Appendix to the Petition for Writ of Certiorari at pages Pet. App. 19 through Pet. App. 65.

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STATEMENT OF FACTS

On October 31, 2002, New York City's Administration for Children's Services ("ACS") received two reports alleging child abuse with regard to six-month-old Kenny Salas. These reports indicated that Kenny had been hospitalized the day before with life-threatening injuries that appeared to have been caused by extremely violent shaking ("Shaken Baby Syndrome"), and that

Kenny had apparently sustained a rib fracture several weeks earlier.

That day, ACS's Child Protective Services division assigned a caseworker, Kathleen Cerrito, to investigate. Cerrito interviewed the physician at Long Island Jewish Hospital ("the Hospital") and Kenny's mother, petitioner Sally Cornejo ("Cornejo"). At that preliminary point in her investigation, Cerrito could not verify Cornejo's claim that she was not home when Kenny was apparently shaken. ACS also could not rule out Cornejo's responsibility for the prior rib fracture.

After consulting her supervisors, Cerrito removed Kenny's 18-month-old brother, Kevin Salas, from his parents' custody on an ex parte emergency basis, as authorized by N.Y. Fam. Ct. Act § 1024. Kevin was placed in foster care with a relative.

The next day, November 1, 2002, attorneys in ACS's Division of Legal Services prepared and filed child-abuse petitions against the parents, Cornejo and Rothman Salas ("Salas"), under Article 10 of the Family Court Act. Kenny remained hospitalized, and he died on November 7, 2002.

ACS's continued investigation substantiated Cornejo's assertion that she was not home when Kenny was allegedly shaken. The investigation indicated that Salas was the only adult caring for Kenny at that time. On November 14, 2002, the Medical Examiner advised an ACS attorney that she could not yet determine whether Kenny had died from Shaken Baby Syndrome, but she had found during the autopsy that the condition of

Kenny's rib was a congenital malformation, not a fracture.

The next day, November 15, 2002, only two weeks after Kevin's removal, ACS moved by order to show cause for Kevin's immediate return to Cornejo. ACS asked that the return be under ACS's supervision while the child-abuse proceedings were pending, a status known as "parole" (Joint Appendix ("A") at A-534-535).

At a hearing on November 19, 2002, ACS presented testimony from Kenny's physician at the Hospital, who discussed her diagnosis of Shaken Baby Syndrome, but also explained why she believed that Cornejo was not at home when Kenny was shaken. Despite the physician's testimony in support of ACS's application to return Kevin to Cornejo's custody, the Family Court ordered that Kevin remain with his aunt (A-535-539, A-541, A-544).

On the next court date, December 11, 2002, ACS reiterated its request for Kevin to be returned to Cornejo. The Family Court questioned why ACS had not sought to withdraw the abuse petitions against Cornejo (A-550, A-557, A-568).[1] After the ACS attorney consulted her supervisors, she did move to withdraw the petitions against Cornejo (which would leave them pending against Salas). However, the Family Court denied ACS's application, explaining that the Court was not

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[1] Respondents have cited pages of the Family Court transcript as they appear in the Joint Appendix. Respondents do not concede that the excerpt presented with the Petition, at Pet. App. 68-71, is an accurate reproduction.

"comfortable entertaining an application for an outright parole to the mother" in light of the medical uncertainty as to why Kenny died (A-561-562; Pet. App. 29-30).

The cause of Kenny's death was called into question when the Medical Examiner's autopsy report of January 22, 2003, concluded that Kenny had died from a heart defect, not from being shaken. Kenny's doctors at the Hospital adamantly disagreed with that conclusion, and reiterated their diagnosis of Shaken Baby Syndrome.

Consequently, a meeting was convened, attended by the physicians from the Hospital and from the Medical Examiner's Office, as well as members of the Queens County District Attorney's Office, ACS's attorneys, Cornejo's attorney, and Kevin's law guardian (A-212; A-582; A-817). The physicians from the Hospital and the Medical Examiner's Office maintained their divergent beliefs about the cause of death, but they did agree to consult an independent expert, Dr. Paul M. Weinberg, a pediatric cardiologist at Philadelphia Children's Hospital (A772-773). In addition, ACS contacted pediatric pathologist Dr. Janice Ophoven of the Crackleberry Group in Indiana (A-130).

Until these experts weighed in, ACS was reluctant to withdraw the abuse petitions against Salas. Nonetheless, even while recognizing the complexity of the medical issues, the Family Court denied ACS's requests to withdraw the petitions against Cornejo unless ACS also agreed to withdraw them against Salas (A-625).

At last, on February 4, 2003, the Family Court granted ACS's request to parole Kevin to

Cornejo under ACS's supervision. The Family Court directed Cornejo to keep Kevin within New York State while the proceedings were pending, and not to allow any contact between Kevin and Salas (A-124-125).

On April 29, 2003, Dr. Weinberg completed his report and, like the Medical Examiner, diagnosed a myocardial infarction of unknown cause (A772-773). Dr. Ophoven also could not conclude that Kenny died from being shaken. On May 20, 2003; Cornejo joined ACS in seeking dismissal of the petitions against her (A-760-771).

On June 10, 2003, ACS requested, and the Family Court finally granted, permission to withdraw the petitions as to both Cornejo and Salas (A-133-134, A-136). ACS explained that it now had "no basis to dispute the findings of the Medical Examiner," and "d[id] not believe that any evidence currently exists which could prove this Petition by a preponderance of the evidence" (A-644).

Cornejo, for herself and Kevin, sued the City of New York, the then-ACS Commissioner, and several ACS attorneys, caseworkers and supervisors. The United States District Court granted defendants' motions for summary judgment dismissing the complaint (Pet. App. at 64). The Court held, in relevant part, that the ACS attorneys were entitled to absolute immunity from liability under 42 U.S.C. § 1983 (Pet. App. 56-57). The Court followed the holding of the Second Circuit Court of Appeals in *Walden v. Wishengrad*, 745 F.2d 149, 152 (2d Cir. 1984), that an attorney representing a County Department of Special

Services in child-protective proceedings "was entitled to absolute immunity, because her duties in initiating and litigating those proceedings were 'similar to those of a prosecuting attorney'" (Pet. App. at 56).

The District Court emphasized that prosecutorial immunity covered all the "'activities that can fairly be characterized as closely associated with the conduct of litigation'" (Pet. App. at 56, quoting *Barrett v. U.S.*, 798 F.2d 565, 571-72 (2d Cir. 1986)). Furthermore, the District Court held that the ACS attorneys' absolute immunity from § 1983 liability encompassed Cornejo's contention that "the attorneys disregarded the instructions from the ACS caseworkers to withdraw the petition against Cornejo" (Pet. App. 56-57).

The Court of Appeals for the Second Circuit affirmed. The Second Circuit explained, in relevant part, that the question of whether an employee of the executive branch of government is entitled to absolute or qualified immunity turns on what this Court has called a "'functional' analysis" (Pet. App. at 10, citing *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983)). Like the District Court, the Second Circuit held that, under this analysis, absolute immunity applied to "prosecutorial activities" that were "'intimately associated with the judicial phase of the criminal process, and thus [are] functions to which the reasons for absolute immunity apply with full force'" (Pet. App. at 10, quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)). The Second Circuit reasoned that "absolute immunity also extends to non-prosecutor officials when they are performing 'functions analogous to those of a prosecutor'" (Pet. App. at 10, quoting *Butz v.*

Economou, 438 U.S. 478, 515 (1978)). The Second Circuit explained that "[w]hile any analogy between two kinds of executive employees is never perfect, such reasoning by analogy is at the heart of judicial thinking: things that are essentially alike should be treated essentially the same" (Pet. App. at 10). Thus, the Second Circuit pointed out that, in *Butz*, this Court had applied absolute immunity to an agency official's decision to institute an administrative proceeding (Pet. App. at 10).

Consequently, the Second Circuit held, as it had in *Walden v. Wishengrad*, 745 F.2d at 152, that, given the importance of child protection activities, as well as "the need to pursue protective child litigation vigorously and the potential for subsequent colorable claims'" arising from those activities, the ACS attorneys "must be accorded absolute immunity from § 1983 claims arising out of the performance of [their] duties" (Pet. App. at 11).

REASONS FOR DENYING THE WRIT

I. Cornejo's Fact-Based Claim Does Not Warrant This Court's Review.

The question raised by Cornejo does not present any "compelling reasons" for granting the petition. *See* Sup. Ct. R. 10. Indeed, the District Court and the Second Circuit properly applied this Court's functional analysis in determining that the ACS attorneys were entitled to absolute immunity in this case. Moreover, Cornejo's challenge to the holding of the Courts below is based on her particular interpretation of the facts of this case. The decisions below explained why that

interpretation does not undercut the application of absolute immunity, and the Courts' resolution of that issue does not warrant review by this Court.

Cornejo asserts that the child-abuse petitions brought against her had "no merit," when in fact the petitions were based on Kenny's death from what appeared to be an intentional and violent shaking, as well as his apparent prior rib fracture. ACS reasonably inferred that Kevin was in danger of being abused unless he was removed from his parents' care.

Cornejo also alleges that the ACS caseworkers were somehow the "clients" of the ACS attorneys, and that the attorneys had "contravened" the caseworkers' "instructions." Even assuming for the sake of argument that the caseworkers were the attorneys' clients, the factual record in this case does not support Cornejo's assertion of liability based on the attorneys' supposed disobedience of the caseworkers' instructions.

Kevin was placed in foster care with a relative on October 31, 2002. Cornejo contends that, in mid-November, 2002, the caseworkers instructed the attorneys to "withdraw the case against Ms. Cornejo and return Kevin to her" (Pet. at 3). Cornejo relies on the deposition testimony of Child Protective Manager Joyce De Nicholson, who could not recall when she spoke to an attorney during that period, to whom she spoke, or what she said (A-377-379).

In fact, the ACS attorneys promptly sought to have Kevin returned to Cornejo's custody as soon as they verified that she was not at home when

Kenny was allegedly shaken, and that the condition of Kenny's rib was not a fracture resulting from child abuse. ACS made this application in a November 15, 2002 order to show cause, only about two weeks after Kevin had been removed, and only one day after learning from the Medical Examiner that Kenny's suspected prior rib injury was, in fact, a congenital condition.

ACS asked that Kevin be "paroled" to Cornejo under ACS's supervision, to ensure that Kevin remained in New York City, and away from Salas, while the proceedings were pending. The Family Court denied that application, as well as the application made on December 11, 2002.

Furthermore, at the hearing on December 11, 2002, the Family Court urged ACS to move to withdraw the petitions against Cornejo, and ACS made that motion. Nonetheless, the Family Court denied the motion, even as it recognized that ACS could not withdraw the petitions without judicial approval (A-671-672). Subsequently, the Family Court refused ACS's repeated motions to withdraw the petitions against Cornejo. Thus, the Family Court, rather than the ACS attorneys, prolonged Kevin's separation from Cornejo.

After the Medical Examiner issued her report on January 22, 2003, the ACS attorneys were able to get the Family Court, at last, to parole Kevin to Cornejo, on February 4, 2003.

Nevertheless, the Family Court refused to allow ACS to withdraw the petitions against Cornejo without withdrawing them against Salas. ACS was faced with different medical opinions concerning the cause of Kenny's death, and

whether Salas was responsible for that death. Thus, the ACS attorneys sought to mediate the medical dispute before withdrawing the petitions against Salas (A-120-121, A-586, A-815-816). That judgment call is understandable, because Kenny was in Salas's care when he lost consciousness, and ACS needed to take the safer course of action and ensure that Salas presented no risk to Kevin. Moreover, as noted by the District Court, the decision whether to seek judicial permission to withdraw a petition is precisely the type of decision "incident to the filing and litigation of the petition in Family Court" that is "intimately associated" with the judicial process and therefore should be within the scope of absolute immunity (Pet. App. at 57). *See Imbler*, 424 U.S. at 430.

Therefore, Cornejo's discussion of the roles of clients and their privately-retained attorneys in the settlement of civil cases in general (Pet. at 24-26) is inapposite. For all these reasons, this is not an appropriate case for this Court's review.

II. The Courts Below Correctly Applied Absolute Immunity.

A. Precedent Supports Application of Absolute Immunity to ACS Attorneys.

This Court need not review the Second Circuit's logical application of absolute immunity in this case. Cornejo's challenge to that holding is based on only a portion of this Court's absolute-immunity analysis — the scope of common-law immunity in 1871, when § 1983 was enacted as § 1 of the Civil Rights Act.

In evaluating absolute immunity, this Court does engage in "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler*, 424 U.S. at 421. Thus, the Court held in *Imbler* that the historical common-law immunity of prosecutors should translate into a prosecutor's absolute immunity from liability under § 1983 for actions taken within the scope of the prosecutor's duties as an advocate. *Id.* at 421-423.

Cornejo erroneously asserts, however, that the scope of absolute immunity depends solely on that historical analysis. According to Cornejo, in 1871, there was no mechanism to remove children from parents who abused or neglected them and, therefore, no governmental attorneys were employed to bring petitions to safeguard those children (Pet. at 12-15).

Cornejo fails to appreciate that this Court has applied absolute immunity, not just to prosecutors, but also to attorneys whose duties are analogous to those of a prosecutor, such as an agency attorney who initiates an administrative proceeding, participates in the trial, and presents evidence before the tribunal. *Butz v. Economou*, 438 U.S. 478, 515, 516 (1978); *see Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (citing the holding in *Butz* that absolute immunity encompasses "prosecutors and similar officials" and "executive officers engaged in adjudicative functions").

The policy considerations expressed by this Court in both *Imbler* and *Butz* support applying absolute immunity to ACS attorneys, even though

their precise office did not exist in 1871. This Court explained in *Butz* that an agency attorney's exercise of independent judgment in bringing a proceeding and presenting evidence could be curtailed if the attorney risked being held liable in damages. 438 U.S. at 515-516 (citing the "serious danger that the decision to authorize proceedings will provoke a retaliatory response" through litigation). Similarly, in *Imbler*, this Court pointed out that:

> A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages.

Imbler, 424 U.S. at 424-425. This Court has also noted that an administrative proceeding gives a defendant "ample opportunity to challenge the legality of the proceeding," without the need for a § 1983 action. *Butz*, 438 U.S. at 515.

In *Walden v. Wishengrad*, the Second Circuit soundly applied the same analogy to a governmental attorney charged with the responsibility of protecting vulnerable children in Family Court proceedings. Even assuming that protection for children did not yet exist in 1871, a strong public interest in providing such protection has since been recognized.

Walden v. Wishengrad concerned a former child-protective caseworker's false-arrest claim

against a Department of Social Services attorney who allegedly got her arrested for failing to appear in Family Court. 745 F.2d at 150-151. The Second Circuit recognized that absolute immunity "should be accorded only in exceptional cases." *Id.* at 152. Nonetheless, the Court followed the absolute-immunity analysis in *Imbler* because "[a]s a Department attorney, Wishengrad initiates and prosecutes child protective orders and represents the interests of the Department and the County in Family Court. As such, her duties are similar to those of a prosecutor, who acts 'as an advocate for the State' in criminal matters." *Id.* (internal citation omitted). The Court emphasized that:

> Given the importance of the Department's activities, the need to pursue protective child litigation vigorously and the potential for subsequent colorable claims, Wishengrad should be accorded absolute immunity from claims arising out of the performance of her duties. She must be allowed to perform her duties free from fear of potential lawsuits by individuals allegedly harmed by her actions.

745 F.2d at 152. Subsequently, in *Cornejo*, the District Court and Second Circuit soundly applied the same reasoning as in *Butz* and *Walden*.

Cornejo acknowledges that child-abuse proceedings are brought to protect the child (Pet. at 19, 20-21). *See Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 27 (1981) (noting that "the State has an urgent interest in the welfare of the child").

Cornejo does not appreciate, however, that this societal interest should entitle child-welfare attorneys to absolute immunity from liability that might otherwise affect their pursuit of those proceedings. For these reasons, this Court need not revisit the Second Circuit's holding.

B. The Attorneys Duties Gave Them Absolute Immunity.

Cornejo also mistakenly asserts that the attorneys were not entitled to absolute immunity for the particular conduct that forms the basis for her lawsuit (Pet. Br. at 14). This Court employs a "functional" approach in deciding whether an employee of the executive branch of government is entitled to absolute or qualified immunity. *Buckley v. Fitzsimmons*, 509 U.S. 259, 271 (1993). Indeed, Justice Scalia cited some "curious" results emanating from the Court's functional analysis, but explained that "both *Imbler* and the 'functional' approach are so deeply embedded in our § 1983 jurisprudence that, for reasons of stare decisis, I would not abandon them now." *Kalina v. Fletcher*, 522 U.S. 118, 132, 135 (1997) (Scalia, J., concurring).

In *Imbler*, this Court listed numerous examples of duties encompassed within a prosecuting attorney's advocacy function, for which the prosecutor is immune from § 1983 liability: "whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present." *Imbler*, 424 U.S. at 431 n.33.

The conduct cited by Cornejo in this petition is the continuation of the child-abuse proceedings (Pet. at 7). The decision whether to pursue or withdraw a Family Court petition is manifestly the function of an advocate. The District Court and Second Circuit soundly held, consistent with the reasoning of *Imbler*, that the ACS attorneys in this case were entitled to absolute immunity for those decisions (Pet. App. at 10-11, 56-57).

This Court has pointed out the breadth of absolute immunity. As it explained in *Buckley*, "the *Imbler* approach focuses on the conduct for which immunity is claimed, not on the harm that the conduct may have caused or the question whether it was lawful." *Buckley*, 509 U.S. at 271. Thus, a prosecutor would be immune from liability for presenting evidence at a probable-cause hearing even if, unlike this case, the attorney made or elicited false statements during that hearing. *See Buckley*, 509 U.S. at 270 (describing *Burns v. Reed*, 500 U.S. 478 (1991).

Here, by contrast, the conduct of the ACS attorneys did not even remotely approach that level of malfeasance. When the attorneys learned from the medical experts that Cornejo could not have been responsible for abusing Kenny, they immediately and aggressively pursued Kevin's return to Cornejo. Soon, they also sought withdrawal of the petition against her. Not only was Cornejo not harmed by the ACS attorneys' decisions, she would have benefited if the Family Court had chosen to grant the relief sought by ACS. However, even if she had been harmed by the decision to continue the Family Court proceedings, the ACS attorneys would be shielded from liability

by absolute immunity for their advocacy functions, as held by the District Court and Second Circuit. In sum, the logical decisions reached by the Courts below do not require review by this Court.

III. Cornejo Has Not Shown a Conflict in the Case Law or Identified an Important Federal Question to Support Her Petition for Certiorari.

Cornejo's petition fails to establish a conflict among the Circuit Courts of Appeals, or a conflict with this Court's prior cases, so as to justify her petition for certiorari. Similarly, Cornejo's speculation about the reach of the Second Circuit's decision does not merit this Court's attention.

A. Cornejo Failed to Show a Conflict Among the Circuit Courts.

The cases cited by Cornejo demonstrate consistency, rather than conflict, among the Circuit Courts of Appeals in granting absolute immunity to governmental attorneys who initiate and pursue child-protective proceedings (Pet. at 16-17). *E.g.*, *PJ v. Wagner*, 603 F.3d 1182, 1195 (10th Cir. 2010) (proceeding in juvenile court to take child into protective custody because of parents' failure to obtain proper treatment for child's cancer); *Gray v. Poole*, 243 F.3d 572, 577 (D.C. Cir. 2001) (initiating and prosecuting a child-neglect petition).

Indeed, in *Gray v. Poole*, the District of Columbia Circuit eloquently explained the basis for recognizing absolute immunity in these circumstances. The Court held that, as in the administrative proceeding described in *Butz*, the

governmental attorneys had to "'make the decision to move forward ... free from intimidation or harassment.'" *Gray*, 243 F.3d at 577 (quoting *Butz*, 438 U.S. at 516). The *Gray* court pointed out that "[t]he prospect of angry, retaliatory litigation by targets of the attorneys' actions is at least as likely in child neglect cases as in efforts to suspend the registration of commodities merchants" that were at issue in *Butz*. *Gray*, 243 F.3d at 577. In addition, the *Gray* court noted that both types of proceedings enabled the respondents to challenge the legality of the governmental actions. *Id.* The Court concluded: "If anything, the function of an attorney who litigates a Superior Court neglect action is closer to that of the prosecutor in *Imbler* than was the function of the agency attorney who litigated administrative hearings in *Butz* itself." *Gray*, 243 F.3d at 577. Accordingly the Court found the attorney immune from § 1983 liability for allegedly filing the neglect proceeding without cause and making supposedly libelous statements in the course of that proceeding. *Id.* at 577-578. Accordingly, Cornejo's petition cannot be based on a conflict in the case law.

B. The Second Circuit's Decision Does Not Apply Immunity in All Civil Litigation.

The application of absolute immunity to the ACS attorneys in this case does not open the door to an assertion of blanket immunity for all attorneys in civil litigation, as Cornejo claims (Pet. at 10-13, 16-17). Indeed, private attorneys are generally not subject to § 1983 liability because they are not acting under color of state law.

Cornejo's reliance on *Wyatt v. Cole*, 504 U.S. 158 (1992), is misplaced (Pet. at 11-12). In *Wyatt*, this Court explicitly held that a private attorney using a state replevin statute does not have the kind of qualified immunity from § 1983 liability that might be conferred upon a government official. This Court explained that qualified immunity for private actors was not supported by either a history of immunity from common-law claims such as malicious prosecution, nor by a policy justification such as a need to preserve the officials' "ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service." 504 U.S. at 163-168.

Finally, the Second Circuit's holding does not alter or extend the reach of absolute immunity to all the conduct of all the attorneys who may be hired to assist governmental entities, as Cornejo alleges (Pet. at 12). Indeed, the cases Cornejo cites are distinguishable (Pet. at 22-23). In those cases, this Court employed its functional approach to determine that attorneys' activities other than advocacy, such as aiding a police investigation or holding a press conference, were not entitled to the protections of absolute immunity.

In contrast, *Cullinan v. Abramson*, 128 F.3d 301, 310 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998) (Pet. at 12), held that a city's outside counsel might be entitled to qualified immunity for its defense of a lawsuit against the city. In this case as well, the Second Circuit's holding concerned the ACS attorneys' core advocacy function.

For all the reasons stated, the Second Circuit properly affirmed the District Court's dismissal of Cornejo's action against the ACS attorneys based upon absolute immunity. This case does not raise any issues warranting further review by this Court.

CONCLUSION

FOR THE REASONS STATED, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
July 6, 2010

Respectfully submitted,

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
Attorney for Respondents
100 Church Street
New York, New York 10007
(212) 788-1020 or 1072

LEONARD J. KOERNER,*
KRISTIN M. HELMERS,
JANET LYN ZALEON,
of Counsel.

*Counsel of Record